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THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND COMPULSORY SELF-DISCLOSURE UNDER THE CLEAN AIR AND CLEAN WATER ACTS

*O.A. Caginalp**

I. INTRODUCTION

In recent years, environmental legislation has been passed by Congress that requires extensive disclosure of information by polluters. Such disclosure, when used to exact penalties from the providers of the information raises potential conflicts with respect to the fifth amendment privilege against self-incrimination. The conflict arises when information received by the government pursuant to required notification or records under the applicable statute is used by the government to prove its case against the alleged polluter. Two statutes which authorize such use along with a self-reporting provision are the Clean Air Act¹ and the Federal Water Pollution Control Act (FWPCA).²

Under the Clean Water Act, the owner or operator of a facility from which oil or other hazardous material has been spilled must report to the authorities.³ Such a polluter then becomes subject to a mandatory civil penalty.⁴ Other sections of the Clean Water Act⁵ (dealing with effluent limitations) which are paralleled by corresponding sections of the Clean Air Act⁶ provide for monitoring and

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1. 42 U.S.C. §§ 7401-7462 (Supp. III 1979).

2. 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979). The Federal Water Pollution Control Act (FWPCA), is commonly referred to as the Clean Water Act. For the sake of simplicity, this article will refer to the Federal Water Pollution Control Act as FWPCA or Clean Water Act.

3. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

4. *Id.* § 311(b)(6), 33 U.S.C. § 1321(b)(6).

5. *Id.* §§ 301-308, 33 U.S.C. §§ 1311-1318.

6. Clean Air Act, §§ 112-114, 116, 120, 42 U.S.C. §§ 7412-7414, 7416, 7420 (Supp. III 1979).

recordkeeping by various persons who may later be subject to civil penalties for any violations. Under the statutes, information received pursuant to such records may be used in the identification of violators and assessment of penalties.

The validity of the Clean Water Act oil spill notification requirement along with its automatic civil penalty have spurred challenge on constitutional grounds since its inception.⁷ Litigants have complained that the mandatory penalty is criminal in nature despite its statutory "civil" label, and that its assessment on the basis of information gathered through compulsory self-reporting is barred by the fifth amendment privilege against self-incrimination. The fifth amendment states that "[n]o person, . . . shall be compelled in any criminal case to be a witness against himself"⁸ The distinction between a civil penalty and a criminal penalty is of constitutional import because the self-incrimination clause is expressly limited to criminal cases.

In June, 1980, the Supreme Court ruled, in *United States v. Ward*,⁹ that the Clean Water Act penalty provision is civil in nature and therefore its imposition upon an individual on the basis of compelled self-disclosure is constitutionally permissible. In so doing, the Court settled a split among the circuit courts and reversed the holding of the Tenth Circuit Court of Appeals in *Ward v. Coleman*.¹⁰ The Tenth Circuit's holding in *Ward* contradicted three appellate¹¹ and several district¹² courts. The Supreme Court in *Ward* has established a comprehensive framework of analysis which will doubtless be utilized in future cases involving a determination of the civil or criminal nature of a penalty.

This article will first discuss the section of the Clean Water Act dealing with oil and hazardous substance discharges. A discussion of *Ward* will follow, focusing on the factors examined by the Supreme Court in its determination of the character of the penalty provision

7. See Comment, *Water Act's Oil Spill Notification Rule Survives Constitutional Challenge*, 6 ENVTL L. REP. 10011 (1976).

8. U.S. CONST. amend. V.

9. *United States v. Ward*, 448 U.S. 242 (1980).

10. 598 F.2d 1187 (10th Cir. 1979).

11. See *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305 (7th Cir. 1978); *United States v. Allied Towing Corp.*, 578 F.2d 978 (4th Cir. 1978); *United States v. LeBoeuf Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977).

12. See *United States v. Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977), *aff'd*, 573 F.2d 1303 (3d Cir. 1978); *Tug Ocean Prince, Inc. v. United States*, 436 F. Supp. 907 (S.D.N.Y. 1977); *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D.W.Va. 1976); *United States v. General Motors Corp.*, 403 F. Supp. 1151 (D. Conn. 1975).

of section 311(b)(6). Finally, a comparison of the Clean Water Act oil spill provision with sections of the Clean Air Act and the Clean Water Act effluent limitation sections will be presented. The effects which *Ward* may have on future litigation on that area will be considered.

II. STATUTORY CONTEXT OF *WARD*

The policy declaration of the Clean Water Act was revised substantially by the 1972 Amendments. These Amendments reflect the departure in federal water pollution control policy from a water quality standards control mechanism to a discharge control mechanism.¹³ The objective of the Act is to restore and maintain the natural chemical, physical, and biological integrity of the nation's waters.¹⁴ In order to achieve its policy objectives, the Clean Water Act prohibits the discharge, in harmful quantities, of oil or hazardous substances into the navigable waters or onto the adjoining shorelines of the United States. Amounts which are deemed "harmful" shall be those determined by the President.¹⁵

Critical to the proper administration and enforcement scheme of the Act is section 311(b)(5)¹⁶ which requires "any person in charge of a vessel or of an onshore facility or an off-shore facility" to notify the

13. S. REP. NO. 92-414 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3678, 3678. The former regulatory approach to water pollution control permitted a free use of water for waste disposal up to a point of "unreasonableness" which was legally defined. Under that approach the enforcement authority had the burden of proving that discharges harm marine resources or deter other uses. The discharge control mechanism brought about by the 1972 amendments has given effluent standards a dominant role with the water quality standards serving an important interstitial function. A flat prohibition is declared against "the discharge of any pollutant by any person," except where permitted under various provisions of the Act setting effluent standards. 33 U.S.C. § 1311(a) (1976 & Supp. III 1979). Whereas the former approach required an assessment of the harm to the environment, the new amendment requires only a determination that a non-permitted discharge is taking place.

14. See note 13 *supra*.

15. Clean Water Act § 311(b)(3), 33 U.S.C. § 1321(b)(3) (1976 & Supp. III 1979). The President, through the Environmental Protection Agency (EPA), defined harmful quantities as all oil discharges that violate water quality standards or "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. § 110.3 (1980).

16. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979). This section states in part:

Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge.

appropriate agency of the United States Government¹⁷ of the discharge in violation of section 311(b)(3)¹⁸ immediately upon learning of the discharge. Should that person fail to make such a notification, he is liable for a fine of not more than \$10,000, imprisonment for not more than one year, or both.¹⁹ Section 311(b)(5) further contains a "use immunity" provision which states that information received pursuant to such notification shall not be used against any such person in any criminal case except a prosecution for perjury or misrepresentation.²⁰

Another section of the statute, 311(b)(6)(A), imposes a "mandatory" civil penalty of up to \$5,000 for each offense on all discharges of oil and hazardous substances.²¹ This is a strict liability offense, for which there is no defense. The Coast Guard is the agency empowered to determine and collect the civil penalty.²² In determining the amount of the penalty, the factors which may be taken into account

Any such person . . . who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against such person in any criminal case, except a prosecution for perjury or for giving a false statement.

17. The "appropriate agency" to notify encompasses "any federal agency concerned with water and environmental pollution or navigable waters." *United States v. Kennecott Copper Corp.*, 523 F.2d 821, 824 (9th Cir. 1975). A list of the appropriate persons to notify appears in 33 C.F.R. § 153.203 (1980).

18. 33 U.S.C. § 1321(b)(3) (1976 & Supp. III 1979).

19. See note 16 *supra*.

20. *Id.*

21. Clean Water Act § 311(b)(6), 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979). Section 311(b)(6)(A) states in part:

Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of the subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States at the time of the discharge, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$5,000 for each offense. . . . In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary

The penalty is mandatory since the Act states that a violator "shall" be assessed a civil penalty rather than "may." 33 U.S.C. § 1321(b)(6)(A) (1976 & Supp. III 1979).

22. Clean Water Act, § 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) (1976 & Supp. III 1979).

include the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation.²³ The Coast Guard policy²⁴ relating to enforcement of section 311(b)(6) is that the penalty will be "at or near the maximum unless a lesser penalty is clearly justified by one of the factors listed in the [statute],"²⁵ among which is the "gravity of the violation."²⁶ Coast Guard policy with respect to "gravity of violation" indicates that the factors to be taken into account in determining gravity include "the degree of culpability associated with [the violation], the prior record of the responsible party and the amount of the discharge."²⁷ Not to be considered in determining the amount of the penalty are any decisions by federal or state authorities to bring criminal charges, or any cleanup efforts by the violator.²⁸

Section 311(c)(1)²⁹ authorizes the President to act to remove or arrange for the removal of any oil or hazardous material discharged unless it is determined that such removal will be done properly by the operator or owner of the source of discharge. The cleanup provision of the Act, section 311(f), holds the owner or operator liable for actual costs incurred by the United States Government for the containment, removal, and dispersal of the discharge.³⁰ Unlike section 311(b)(6), section 311(f) does not impose strict liability upon the pollutor for the cleanup costs. Four defenses are available, namely, that the discharge was solely the result of (a) an act of God, (b) an act of war, (c) negligence on the part of the United States Government, or (d) an act or omission of another party.³¹ Furthermore, there are limitations placed on cleanup cost liability,³² which can be waived by the government if the United States can sustain the burden of show-

23. *Id.*

24. The Coast Guard policy relating to assessment of civil penalties under § 311(b)(6) of the FWPCA was commended during the debates prior to the passage of the FWPCA amendments of 1972, and the statement of that policy is reprinted in the Congressional Record. 118 CONG. REC. 33757-58 (1972).

25. *Id.* at 33758.

26. Clean Water Act, § 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) (1976 & Supp. III 1979).

27. 118 CONG. REC. 33758 (1972).

28. *Id.*

29. 33 U.S.C. § 1321(c)(1) (1976 & Supp. III 1979).

30. 33 U.S.C. § 1321(f)(1) to (3) (1976 & Supp. III 1979).

31. 33 U.S.C. § 1321(f) (1976 & Supp. III 1979).

32. The cleanup cost liability of the owner or operator of a vessel is \$150 per gross ton or \$250,000, whichever is greater, except for an inland oil barge, which is limited to \$125 per gross ton or \$125,000. An onshore or offshore facility is limited to cleanup cost liability of \$50,000,000. The costs of removal of the spill include any costs or expenses incurred by the

ing that the discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner."³³

The above provisions of the Clean Water Act provide a comprehensive regulatory scheme incorporating both criminal and civil sanctions to reimburse the government with respect to clean-up costs, and to provide protection for the public from spills of oil and other hazardous substances. When information obtained through the required notification provision³⁴ is used in a proceeding to establish a civil penalty under section 311(b)(6),³⁵ an issue concerning possible fifth amendment privileges arises.

III. THE FIFTH AMENDMENT PRIVILEGE AND THE CIVIL-CRIMINAL DISTINCTION

The fifth amendment of the United States Constitution provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This provision has been held applicable to the states through the fourteenth amendment.³⁶ The privilege against self-incrimination is conferred only upon individuals—it is not available to a corporation,³⁷ and is also denied to an unincorporated entity, such as a labor union³⁸ or a partnership,³⁹ if the enterprise in question represents group interests as opposed to private or personal ones. The constitutional privilege is designed to shield natural persons from sovereign compulsion to give testimony that might subject them to criminal liability.⁴⁰

Read literally, the constitutional language conferring the privilege against self-incrimination would apply only in criminal proceedings against the holder and, further, might be construed as protecting only incriminating statements that the government sought to elicit from the witness after he was sworn in as a witness. But the language has been read broadly, consistent with its underlying purpose of preventing the government from compelling an individual to present evidence that may incriminate himself. To begin with, the

government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge. 33 U.S.C. § 1321(f)(1) to (4) (1976 & Supp. III 1979).

33. *Id.* § 311(f)(3), 33 U.S.C. § 1321 (f)(3).

34. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

35. 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

36. *Malloy v. Hogan*, 378 U.S. 1 (1964).

37. *Hale v. Henkel*, 201 U.S. 43 (1906) (corporation).

38. *United States v. White*, 322 U.S. 694 (1944) (labor union).

39. *Bellis v. United States*, 417 U.S. 85 (1974) (partnership).

40. *See C. McCORMICK, EVIDENCE*, § 118 at 251 (2d ed. 1972).

privilege of the accused not to be a witness against himself has been construed to confer a right to remain off the witness stand if the accused claims his privilege.⁴¹ He is thus able to avoid completely interrogation in a criminal trial in which he is named defendant. Not only does the accused enjoy a right not to be called to the stand in criminal proceedings against him, but any witness may decline to answer any question that raises an appreciable danger of incriminating him in a subsequent criminal prosecution. Where this latter component of the privilege is claimed, a judge must decide on the basis of the interrogator's question and all the surrounding circumstances, whether the answer would tend to incriminate the witness-claimant.

Thus it is crucial for a judge to determine whether the pending proceeding is criminal or civil in nature before arriving at his decision to deny or uphold the claimant's fifth amendment privilege. In suits involving criminal sanctions, the fifth amendment privilege against self-incrimination exists, while it is absent in civil penalty proceedings. A determination of whether the sanction involved is civil or criminal, therefore, becomes controlling on the question whether the privilege against self-incrimination may be asserted.

The issue of the nature of a penalty has arisen in many cases where the defendant claims that because the penalty in question is criminal, he is entitled to the procedural safeguards present in criminal cases.⁴² The Supreme Court has described the task of attempting to discern whether a particular sanction is criminal or civil in nature as "extremely difficult and elusive of solution."⁴³ Nonetheless, courts have isolated several factors in an attempt to resolve the question.

Congressional labeling of a penalty as civil or criminal is not dispositive. The Supreme Court, in *Trop v. Dulles*,⁴⁴ addressed the question whether procedural due process limitations were applicable to a statute⁴⁵ depriving the petitioner of his citizenship. The Court concluded that Congress' view of the statute as nonpenal was not determinative of the issue.⁴⁶ Similarly, in *United States v. Constantine*,⁴⁷ the Court observed that a penalty could not be converted into

41. See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2268 at 406 (rev. ed. 1961).

42. See text and notes at 44-83 *infra*. For a discussion of these procedural safeguards, see Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974).

43. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

44. 356 U.S. 86 (1958).

45. Nationality Act of 1940, § 401, 8 U.S.C. § 1481 (1976 & Supp. III 1979).

46. *Trop v. Dulles*, 356 U.S. 86, 94 (1958).

47. 296 U.S. 287 (1935).

a tax merely by labeling it as such.⁴⁸ *Constantine* involved a "special excise tax" on retail dealers of liquor operating contrary to state law, which was invalidated as a usurpation of state powers. While the above cases are relevant to a determination of the nature of a statute, neither involved a fifth amendment issue.

Inquiry into the nature of a statute as penal or civil has often focused on the purpose of the statute, using the considerations enumerated in *Kennedy v. Mendoza-Martinez*.⁴⁹ In *Mendoza-Martinez*, the Supreme Court held invalid provisions permitting expatriation for draft evasion "because in them Congress [had] plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the fifth and sixth amendments."⁵⁰ The Court further stated that if a sanction is punitive rather than regulatory, the procedural safeguards of a criminal trial are necessitated. In ascertaining whether the underlying purpose of a statute is penal or regulatory, the Court outlined the following considerations:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry⁵¹

The *Mendoza-Martinez* Court further noted that resort to these factors is not necessary when there is conclusive evidence that Congress intended the statute in question to be punitive.⁵²

In other cases, the courts have looked to legislative history to determine whether a forfeiture provision was meant to be criminal.⁵³ In *One Lot Emerald Cut Stones & One Ring v. United States*,⁵⁴ the

48. *Id.* at 294.

49. 372 U.S. 144 (1963).

50. *Id.* at 165-66.

51. *Id.* at 168-69 (citations omitted).

52. *Id.* at 169. Note, however, that a congressional declaration that a sanction is *not* punitive is *not* conclusive either. See text at note 46 *supra*.

53. See, e.g., *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621, 630 (N.D. Ill. 1963); *United States v. Futura, Inc.*, 339 F. Supp. 162, 165 (N.D. Fla. 1972).

54. 409 U.S. 232 (1972).

Court held that "the question whether a given sanction is civil or criminal is one of statutory construction."⁵⁵ With respect to proof of congressional intent not apparent on the face of the statute, the Court has held that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such ground."⁵⁶ Litigants claiming entitlement to constitutional privileges afforded in criminal cases must therefore face a "clearest proof" standard in showing that the sanction in question is punitive in nature.

Another doctrine places significance on the type of damage sought. Under this approach, if an action is authorized by statute in order to compensate for damages or loss by the government or society, it is not criminal. But if suit is brought primarily to punish the defendant, it is criminal in nature. Application of this doctrine has led to conflicting results. An early case, *Hepner v. United States*,⁵⁷ involved monetary penalties imposed for illegal importation of aliens into the United States under the Alien Immigration Act of March 3, 1903.⁵⁸ The petitioner argued that the judicial procedure for collection of the fine was essentially a criminal prosecution. The Supreme Court, in focusing on the procedure authorized for the collection of the penalty rather than the sanction itself, held that the government could recover a statutory penalty by way of a civil action. No assertion was made, however, that the penalty was a means of reimbursing the government for damages incurred.⁵⁹

Other more recent cases have also found the proceedings to be civil in nature despite the fact that the sanctions involved had little to do with making the government whole for damages suffered. *Helvering v. Mitchell*⁶⁰ involved the application of the double jeopardy clause to a civil proceeding for income tax fraud after a prior criminal acquittal stemming from the same transaction. The defendant contended that the government's additional claim of 50 percent of deficiency (in addition to the amount of the deficiency) was primarily a punitive sanction and that assessment of the claim was therefore barred by the doctrine of double jeopardy. The Court held the doctrine of double jeopardy inapplicable because the 50 percent addition to tax was

55. *Id.* at 237.

56. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

57. 213 U.S. 103 (1909).

58. Act of March 3, 1903, Pub. L. No. 57-162, §§ 4, 5, 32 Stat. 1213, 1214. Sections 4 and 5 of this Act fixed a judicially imposed fine of \$1,000 for violations.

59. In fact, the language of the opinion implies that such a finding is not essential. *Hepner v. United States*, 213 U.S. 103, 106 (1909).

60. 303 U.S. 391 (1938).

"proved primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."⁶¹ A similar case, *United States ex. rel. Marcus v. Hess*,⁶² involved a sanction subjecting to civil liability those persons who had defrauded the United States Government. The Supreme Court held that persons who had previously been indicted and convicted for conspiracy to defraud the government were not subject to double jeopardy by a subsequent civil proceeding. The proceedings involved were held to be civil despite the fact that more than the precise amount of damage was recovered by the government.⁶³

*Rex Trailer Co., Inc. v. United States*⁶⁴ further illustrates that allegations of specific damages are not necessary for a determination that a statute is remedial. The petitioner, after pleading nolo contendere to an indictment for fraudulent purchases of motor vehicles under the Surplus Property Act of 1944⁶⁵ and paying \$25,000 in fines, was charged under civil provisions of the same Act. The Court held that double jeopardy was not available as a defense because the statute involved was remedial. The Supreme Court analogized the government's recovery there to recovery under contractual liquidated damage provisions which fix compensation for anticipated loss.⁶⁶ It was further noted that the damages resulting from Rex Trailer Company's fraudulent purchase of trucks were impossible to ascertain, but that it was obvious that injury to the government resulted.⁶⁷

Another test for determining whether a civil penalty statute is criminal in nature is whether the activities which give rise to the civil sanction also gave rise to a criminal punishment. The fact that the behavior in question may give rise to criminal as well as civil penalties has been said to indicate the criminal nature of the penalty.⁶⁸ However, the fact that a statute merely contains both a civil and a criminal sanction in separate sections does not render

61. *Id.* at 401.

62. 317 U.S. 537 (1943).

63. *Id.* at 550.

64. 350 U.S. 148 (1956).

65. Act of June 30, 1949, Pub. L. No. 78-457, § 26(b)(1) (repealed June 30, 1949, 63 Stat. 399).

66. *Rex Trailer Co. Inc. v. United States*, 350 U.S. 148, 153 (1956).

67. *Id.*

68. *United States v. Constantine*, 296 U.S. 287, 295 (1935) ("special excise tax" levied on retail liquor dealers when they carried on business contrary to local state or municipal law);

both of the sanctions imposed criminal since "Congress may impose both a criminal and a civil sanction in respect to the same act or omission."⁶⁹ The Court found it relevant, in *One Lot Emerald Cut Stones v. United States*,⁷⁰ that the criminal and civil "sanctions were separate and distinct and were contained in different parts of the statutory scheme . . . in determining the character of the forfeiture."⁷¹ By way of contrast, the Court in *Boyd v. United States*⁷² held a forfeiture proceeding to be a criminal action for the purposes of the self-incrimination privilege. The Court based its opinion partly on the fact that the statute under scrutiny⁷³ listed, in the same section, forfeiture along with fine and imprisonment as one possible punishment for customs fraud.

All of the above-mentioned cases shed some light on the various factors considered by the court in its determination of whether an action is civil or criminal. None of those cases, with the exception of *Boyd*,⁷⁵ dealt with compelled testimony and therefore did not directly involve the fifth amendment privilege against self-incrimination. *Boyd*, as well as *Lees v. United States*,⁷⁶ indicate that the privilege against self-incrimination is more zealously guarded than are other procedural safeguards.⁷⁷ *Boyd* was a proceeding, civil in form, for

United States v. LaFranca, 282 U.S. 568, 572-73 (1931) ("tax" assessed in double the usual amount upon evidence of illegal liquor sale); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) ("tax" imposed upon evidence of crime in dealing in liquor).

69. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

70. 409 U.S. 232 (1972).

71. *Id.* at 236. See also *Helvering v. Mitchell*, 303 U.S. 391, 404 n.14 (1938) (citing *Mitchell v. Commissioner*, 32 B.T.A. 1093, 1136 (1935)); "A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof."

72. 116 U.S. 616 (1886).

73. "Act to amend the customs revenue laws, and to repeal moiety laws," ch. 391, § 12, 18 Stat. 186 (1874).

74. Under the Act, a party found in violation of its provisions "shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and in addition to such fine, such merchandise shall be forfeited" *Id.*

75. 116 U.S. 616 (1886).

76. 150 U.S. 476 (1893).

77. The privilege against self-incrimination has been said to embrace "proceedings to enforce penalties and forfeitures as well as criminal prosecutions and is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions." *United States v. Regan*, 232 U.S. 37, 50 (1914) (proof beyond a reasonable doubt need not be established in an action of debt brought by the United States under the contract labor provisions of the Alien Immigration Act); see also *United States v. Zucker*, 161 U.S. 475, 481-82 (1896) (confrontation clause of the sixth amendment not extended to defendants in ac-

the forfeiture of certain goods, imported illegally, under a statute⁷⁸ which provided for criminal penalties as well as forfeiture proceedings. The Court held that compulsion of the defendants to produce evidence in their possession offended both the fourth amendment and the self-incrimination clause of the fifth amendment. The Supreme Court concluded that the proceeding, thought technically civil, was of a "quasi-criminal" nature.⁷⁹

Seven years later, the Supreme Court relied principally upon *Boyd* in its holding in *Lees*.⁸⁰ In that case, the Court held that a proceeding resulting in a "forfeit and penalty" of \$1,000 for violation of an Act prohibiting the employment of aliens was sufficiently criminal to trigger the protections of the self-incrimination clause of the fifth amendment. The Supreme Court has applied *Boyd* more recently in *One 1958 Plymouth Sedan v. Pennsylvania*,⁸¹ and *United States v. United States Coin and Currency*,⁸² to proceedings involving the forfeiture of property for alleged criminal activity. Most recently, however, the Court has stated that "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time."⁸³

IV. THE HISTORY OF THE *WARD* LITIGATION

The facts in *Ward* can be stated quite briefly. In March, 1978, oil overflowed from an open-earth pit at a drilling site owned and operated by L.O. Ward as L.O. Ward Oil and Gas Operations, and flowed into Boggie Creek, Oklahoma, a tributary of the Arkansas River System. A report of the incident was submitted by Ward and received by the EPA in June, 1975. The report was referred to the Second U.S. Coast Guard District, the Commander of which assessed a civil penalty of \$500 against Ward pursuant to section

tion to recover the value of merchandise forfeited to the United States); *Hepner v. United States*, 213 U.S. 103, 112 (1909) (in a civil action involving the Alien Immigration Act, the defendant could not be compelled to testify against himself in respect to any matter involving his being guilty of a criminal offense); *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) (fifth amendment privilege against self-incrimination extended to a case before the grand jury in a case involving alleged violation of an Act to Regulate Commerce).

78. See notes 73-74 *supra*.

79. 116 U.S. 616, 634 (1886).

80. See note 76 *supra*.

81. 380 U.S. 693 (1965).

82. 401 U.S. 715 (1971).

83. *Fisher v. United States*, 425 U.S. 391, 407 (1976) (compelled production of documents relating to tax preparation in possession of attorneys held not to implicate the fifth amendment privilege which taxpayer-clients would have enjoyed from being themselves compelled to produce the documents).

311(b)(6). Ward appealed the assessment to the Commander of the Coast Guard, but the appeal was denied.

A. The District Court Decision

In April, 1976, Ward brought action in U.S. District Court for injunctive and declaratory relief. Ward requested that the court declare unconstitutional and enjoin the enforcement of section 311(b)(6) and other provisions of the FWPCA.⁸⁴ At about the same time, the United States brought suit against Ward and L.O. Ward Oil and Gas Operations to collect the unpaid penalty. The action was consolidated for trial.⁸⁵ Ward argued that he was entitled to judgment as a matter of law because the penalty imposed was criminal or quasi-criminal and thus the self-reporting provision violated the privilege against self-incrimination afforded by the fifth amendment to the Constitution of the United States.⁸⁶

The district court focused a great deal of attention on the question whether the sanction in the case was criminal or civil. While cognizant that Congress had labelled the penalty provision of section 311(b)(6) as "civil," the district court expressed the need for inquiry beyond the face of the statute.⁸⁷ In making such an inquiry, the court applied the criteria set forth in *Kennedy v. Mendoza-Martinez*.⁸⁸ While the district court found the results of some of the *Mendoza-Martinez* tests inconclusive, it was able to conclude on the basis of the others that the 311(b)(6) penalty is civil in nature. A civil penalty was indicated by the fact that only a monetary sanction is imposed and its collection effectuated through a civil procedure.⁸⁹ Since there was no requirement of scienter, the court concluded that the penalty served a remedial function.⁹⁰ The court determined that the provisions of the Act may promote the traditional criminal law aim of deterrence without being considered a criminal penalty.⁹¹ Furthermore, it was found that the purpose of the penalty is to defray the costs of the Act's administration and of clean-up expenses, in-

84. Specifically, those provisions were: 33 U.S.C. §§ 1318, 1319, 1321 (1976 & Supp. III 1979).

85. *Ward v. Coleman*, 423 F. Supp. 1352 (W.D. Okl. 1976).

86. *Id.* at 1354.

87. *Id.* at 1355.

88. 372 U.S. 144 (1963). For a discussion of these criteria, see text and notes at notes 49-52 *supra*.

89. *Ward v. Coleman*, 423 F. Supp. 1352, 1356 (W.D. Okl. 1976).

90. *Id.*

91. *Id.*

dicating its compensatory and remedial nature.⁹² Since persons who spill oil could be punished criminally under the Rivers and Harbors Act,⁹³ the district court addressed the issue of parallel criminal sanctions.⁹⁴ The court cited two prior cases⁹⁵ which have found the result of this test inconclusive. Next, the district court determined that the maximum penalty of \$5,000 was not excessive when compared to the cost which could be incurred in removing harmful discharges.⁹⁶ The fact that the penalty was not excessive was viewed by the court as a further sign of the remedial nature of the 311(b)(6) sanction.

B. The Court of Appeals Decision

On appeal, the Tenth Circuit Court of Appeals reversed⁹⁷ on the ground that the FWPCA's enforcement scheme violates the fifth amendment. Since it concluded that the penalty was sufficiently punitive to trigger fifth amendment protections, the court focused its inquiry on "whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question."⁹⁸ In making its determination

92. *Id.* at 1357.

93. 33 U.S.C. §§ 407, 411 (1976). The Rivers and Harbors Act (Refuse Act) makes it a crime to discharge any refuse matter into the navigable waters of the United States without the permission of the Army Corps of Engineers. Though enacted in 1899, the Act's sanctions were not applied to water pollution until the late 1960's because prior to that time it was thought that the Act applied only to deposits of refuse which impeded navigation and that industrial discharges fell under an exemption for refuse matter "flowing from streets and sewers and passing therefrom in a liquid state." See Olds, Unkovic, & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 DUQ. L. REV. 1 (1977-78).

94. For further discussion on this matter, see notes and text at notes 68-73 *supra*.

95. *United States v. General Motors Corp.*, 403 F. Supp. 1151 (D. Conn. 1975); *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D.W.Va. 1975). The court in *General Motors* stated that although a criminal violation of the Refuse Act is similar to a violation of Clean Water Act § 311(b)(6), in that the element of scienter is not required.

this does not transform the otherwise civil penalty into a criminal one. The factor of whether the act to which the sanction applies was already a crime points to the criminal nature of the sanction only where its function is to punish rather than regulate. In isolation, this factor leaves the civil or criminal nature of § 1321(b)(6) ambiguous.

United States v. General Motors, 403 F. Supp. at 1163. The court reached a similar result in *Eureka Pipeline* where it stated, "[a]lthough the fact that the act for which a civil penalty may be imposed is also subject to criminal punishment may be an indication that the penalty is criminal, it is not determinative since Congress may impose both a criminal and a civil sanction for the same act." 401 F. Supp. at 940 (citations omitted).

96. *Ward v. Coleman*, 423 F. Supp. 1352, 1357 (W.D. Okl. 1976).

97. *Ward v. Coleman*, 598 F.2d 1187 (10th Cir. 1979).

98. *Id.* at 1190 (quoting *Telephone News-System, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621, 630 (N.D. Ill. 1963)).

as to the nature of the penalty, the Tenth Circuit considered the congressional intent discernable from the face of the statute, the actual operation of the enforcement mechanism of the statute, and the indications of congressional intent enumerated by the Supreme Court in *Kennedy v. Mendoza-Martinez*.⁹⁹

The court found that while evidence of congressional intent discernable from the face of the statute was indicative of punitive intent, it was not, alone, sufficiently conclusive to warrant treating the penalty provision as criminal in nature.¹⁰⁰ The court noted that while the civil penalty assessed in section 311(b)(6)¹⁰¹ forms part of a "revolving fund"¹⁰² thus indicating its remedial nature, the statutory language dealing with the automatic assessment of the amount of the penalty indicates a punitive intent.¹⁰³ The court noted, in particular, that the penalty is assessed in every case, without regard to fault and that no defenses are available. The factors used in determining the amount of the penalty¹⁰⁴ were not, in the court's opinion, reasonably related to the purposes of the revolving fund.¹⁰⁵

In order to determine conclusively the nature of the section 311(b)(6) penalty, the court next turned to the administrative enforcement scheme. The court's characterization of the penalty as punitive was buttressed by its examination of the U.S. Coast Guard enforcement policy.¹⁰⁶ The court paid particular attention to the following:

99. 372 U.S. 144, 168-69 (1963). The *Mendoza-Martinez* Court did not explicitly state that the factors are indications of congressional intent, but rather that the factors help determine whether an act is penal or regulatory in character. However, both the Tenth Circuit in *Ward*, 598 F.2d at 1190 and the court in *Atlas Roofing Company, Inc. v. Occupational S. & H. Rev. Com'n*, 518 F.2d 990, 1000 (5th Cir. 1975), have applied those factors as indicating congressional intent.

100. *Ward v. Coleman*, 598 F.2d 1187, 1191 (10th Cir. 1979).

101. 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

102. Under the Clean Water Act, § 311(k), 33 U.S.C. § 1321(k) (1976 & Supp. III 1979), funds collected from the assessment of penalties under § 311(b)(6) are to be paid into a "revolving fund" together with "other funds received under this section" and any money appropriated to the revolving fund by Congress. Money contained in the fund is to be used to finance the removal, containment, or dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the Act. *Id.*, § 311(c), 33 U.S.C. § 1321(c).

103. *Ward v. Coleman*, 598 F.2d 1187, 1191 (10th Cir. 1979).

104. See notes and text at notes 21, 24 *supra*.

105. *Ward v. Coleman*, 598 F.2d 1187, 1191 (10th Cir. 1979).

106. The authority for assessment and collection of civil penalties pursuant to Clean Water Act, § 311(b)(6)(A) is vested in the United States Coast Guard. 33 U.S.C. § 1321(b)(6)(A) (1976 & Supp. III 1979). United States Coast Guard Commandant Instruction 5922.11A (February 23, 1973) [*reprinted in* *United States v. LeBoeuf Bros. Towing Co.*, 377 F. Supp. 558, 568-70

1. the Coast Guard Commandant Instruction "requires the assessment of a civil penalty for each discharge of oil;"
2. Coast Guard policy assesses a penalty at or near the maximum unless a lesser penalty is clearly justified by one of the factors listed in section 311(b)(6);
3. the "degree of culpability," the "prior record" of the party and the "amount of the discharge" are considered in determining the gravity of the violation; and
4. "substantial intentional discharges should result in severe penalties, as should cases of gross negligence."

The court emphasized that the language of the Coast Guard Commandant Instruction lacked any "remedial" tenor since these kinds of considerations—degree of culpability, prior record, and extent of damages—are those traditionally focused on in determining the appropriate penalty in criminal cases. The court further noted that a party may not avoid or reduce the penalty by removing the discharged oil, and that the costs of investigation are not considered in assessing the amount of the penalty.¹⁰⁷

The next factor examined by the Tenth Circuit was the application of the seven tests enumerated by the Supreme Court in *Kennedy v. Mendoza-Martinez*,¹⁰⁸ noted above.¹⁰⁹ While the court found the results of the first two tests of *Mendoza-Martinez* inconclusive,¹¹⁰ the results of the succeeding five were held to indicate a criminal penalty in the case of the FWPCA section 311. The court found that: a) the factors in the Commandant Instruction used in determining the amount of the penalty indicate a scienter requirement;¹¹¹ b) the statute promotes the traditional aims of punishment in that the penalties are based on such factors as the gravity of the violation, the degree of culpability, and the prior record of the party;¹¹² c) the

(E.D. La. 1974).] was promulgated to guide assessment of civil penalties under § 311(b)(6). The policy statement accompanying the Instruction indicates that

a number of considerations may be made in determining the gravity of a violation, such as the degree of culpability associated with the violation, the prior record of the responsible party, and the amount of the discharge. Substantial intentional discharges should result in severe penalties, as should cases of gross negligence and so on.

Id.

107. *Ward v. Coleman*, 598 F.2d 1187, 1192 (10th Cir. 1979).

108. 372 U.S. 144, 168-69 (1963).

109. See text and notes at notes 49-52, 89-96 *supra*.

110. *Ward v. Coleman*, 598 F.2d 1187, 1193 (10th Cir. 1979).

111. *Id.*

112. *Id.*

behavior to which the penalty applies is already a crime¹¹³ under the Rivers and Harbors Act;¹¹⁴ d) the penalty may not rationally be related to any purpose other than punishment since the amount of the fine is not reasonably related to the extent of damage to the environment;¹¹⁵ e) the penalties may often be excessive, indicative of the penal nature of the Act, since fines are more highly correlated with the size of the business rather than with good faith in subsequent clean-up activities of the violator.¹¹⁶

In concluding, the Tenth Circuit, while reluctant to set aside a statutory enforcement scheme created by Congress, felt bound to recognize and abide by the maxim that the privilege against self-incrimination should be liberally construed.¹¹⁷ Having examined the language of the statute, the administrative enforcement scheme, and the indicators of congressional intent, the court concluded that the penalty found in 33 U.S.C. section 1321(b)(6) was criminal in nature. It therefore reversed and remanded to the district court for further proceedings. The court did not, however, strike down the self-reporting requirements of section 1321(b)(5) or the imposition of civil penalties under section 1321(b)(6). It determined that it is permissible to assess civil penalties based on a discharge of oil or other hazardous substance under the Act, provided that the evidence used to establish the discharge is derived from a source wholly independent of the compelled disclosure required by section 1321(b)(5).¹¹⁸

C. The Supreme Court Reversal

The Supreme Court, in an eight-to-one decision written by Justice Rehnquist, reversed the Court of Appeals.¹¹⁹ The Court addressed itself primarily to two questions. First, the Court examined whether Congress, in establishing the penalizing mechanism under section 311(b)(6)¹²⁰ indicated a preference for either criminal or civil penalty,

113. *Id.* at 1193-94.

114. 33 U.S.C. § 407 (1976).

115. *Ward v. Coleman*, 598 F.2d 1187, 1194 (10th Cir. 1979). But note, however, that the court failed to bear in mind that the fine is based, among other considerations, upon the gravity of the violation. As note 106 *supra* indicates, the Coast Guard takes into account the amount of the discharge in determining the gravity of the violation. The amount of the discharge clearly is related to damage caused to the environment and the cost of clean-up.

116. *Ward v. Coleman*, 598 F.2d 1187, 1194 (10th Cir. 1979).

117. *Id.*

118. *Id.*

119. *United States v. Ward*, 448 U.S. 242 (1980).

120. 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

and second, where Congress has indicated intention to establish a civil penalty, whether the statutory scheme was so punitive as to negate that intention.

As to its first inquiry, the Court found it "quite clear"¹²¹ that Congress intended to impose a civil penalty upon persons in Ward's position. The Court placed particular emphasis on the label "civil penalty" which Congress gave the sanction authorized in section 311(b)(6),¹²² and its placement with the criminal penalties set out in the immediately preceding paragraph.¹²³ The Court reasoned that Congress, in drafting the statute, intended to allow imposition of penalties under section 311(b)(6) without extending the constitutional protections accorded criminal defendants.

The Court considered, next, whether, despite its manifest intent, the Act provided for sanctions that are so punitive as to warrant self-incrimination protections. The Court indicated that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such ground."¹²⁴ In making this determination, the Court referred to the seven considerations enumerated in *Kennedy v. Mendoza-Martinez*.¹²⁵ Justice Rehnquist observed that the *Mendoza-Martinez* considerations, while helpful, were neither exhaustive nor dispositive, and that only the fifth—a consideration of whether the behavior to which the penalty applies is already a crime—aided the respondent Ward.¹²⁶ In view of the fact that Ward's conduct was a crime under section 13 of the Rivers and Harbors Act,¹²⁷ the Court noted that this consideration tended, at first blush, toward a finding that section 311(b)(6) is criminal in nature. It reasoned that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission."¹²⁸ Furthermore, the Court, in *Helvering v. Mitchell*¹²⁹ had held as civil a 50 percent penalty for tax fraud, and found it quite significant that the Act in question (Revenue Act of 1928) contained two separate and distinct provisions imposing sanctions and that those sanctions appeared in different parts of the

121. United States v. Ward, 448 U.S. 242, 249 (1980).

122. *Id.*

123. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

124. United States v. Ward, 448 U.S. 242, 249 (1980).

125. 372 U.S. 144, 168-69 (1963). See also text and notes at notes 49-55, 88-96, 108-116 *supra*.

126. United States v. Ward, 448 U.S. 242, 250 (1980).

127. See note 93 *supra*.

128. United States v. Ward, 448 U.S. 242, 250 (1980).

129. 303 U.S. 391 (1938).

statute.¹³⁰ The *Ward* Court therefore found it significant that the civil penalties of one statute and the criminal penalties of another statute were enacted seventy years apart, a fact which tended to dilute the impact of the fifth *Mendoza-Martinez* factor. In sum, while the Court found the factors set forth in *Mendoza-Martinez* to be relevant, it determined that they are in no way sufficient to render unconstitutional the classification of the section 311(b)(6) penalty as civil.¹³¹

The fact that section 311(b)(6) does not trigger *all* the protections accorded a criminal defendant by the Constitution was not considered dispositive by the Court. Ward asserted¹³² that the penalty was "quasi-criminal," that is, sufficiently penal in character to trigger the fifth amendment's protection against self-incrimination, but not other constitutional protections.¹³³ In his argument on the "quasi-criminal" question, Ward relied principally upon *Boyd v. United States*¹³⁴ and later cases quoting its language.¹³⁵ *Boyd* dealt with defendants indicted for attempting to defraud the government of customs duties who filed a claim to recover the goods in question despite the pending indictment. The penalty provision of the relevant statute¹³⁶ provided that a party found in violation of its provisions was subject to a fine of up to \$5,000 but no less than \$50, or be imprisoned for up to two years, or both. In addition to the above, the merchandise involved was to be forfeited. During the trial, the de-

130. See also text at note 60 *supra*, for further discussion of *Helvering*.

131. *United States v. Ward*, 448 U.S. 242, 250 (1980).

132. Brief for Respondent at 31, *United States v. Ward*, 448 U.S. 242 (1980).

133. See text and notes at notes 76-83 *supra*.

134. 116 U.S. 616 (1886).

135. In *Lees v. United States*, 150 U.S. 476 (1883), the Court relied primarily upon *Boyd* in holding that a proceeding resulting in a "forfeit and penalty" of \$1,000 for violation of an act prohibiting the employment of aliens was sufficiently criminal to trigger the protections of the self-incrimination clause. The Court stated that, "[t]his, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd v. United States*, 116 U.S. 616." 150 U.S. at 480. More recently, in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) the Court applied *Boyd* to a proceeding brought by the State of Pennsylvania to secure the forfeiture of a car allegedly involved in the illegal transportation of liquor. In *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), the Court dealt with the applicability of the fifth amendment privilege against compulsory self-incrimination in a proceeding brought by the United States to secure forfeiture of \$8,674 found in the possession of a gambler at the time of his arrest. The Court held that the fifth amendment privilege was properly invoked because the forfeiture statutes were intended to penalize persons involved in a criminal enterprise.

136. "Act to amend the customs revenue laws and to repeal moiety laws," ch. 391, § 12, 18 Stat. 186 (1874).

fendants were compelled to produce evidence in their possession. The Court held that this compulsion was an unreasonable search and seizure under the fourth amendment and violated the fifth amendment self-incrimination clause, declaring that "proceedings instituted for the purpose of declaring forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."¹³⁷ The Court further reasoned that

[a]s, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and that portion of the Fifth Amendment which declares that no person should be compelled in any criminal case to be a witness against himself¹³⁸

In his argument,¹³⁹ Ward attempted to apply *Boyd* to his case on the basis that an oil spill, prohibited by section 311(b)(3)¹⁴⁰ is an "offense against the law"¹⁴¹ because of the language used in section 311(b)(6) which states: "the operator of any . . . facility . . . from which oil . . . is discharged in *violation of paragraph (3)* . . . shall be assessed a civil *penalty* . . . for each offense [Emphasis added]."¹⁴² According to Ward, such language clearly indicates a penalty incurred by the commission of an offense against the law.¹⁴³ Ward also bolstered his argument by stating that "[t]he common law tradition which afforded a broad and liberal application of the self-incrimination privilege is . . . a part of our constitutional heritage,"¹⁴⁴ and cited several cases to prove this point.¹⁴⁵

The Supreme Court in *Ward* declined to follow the reasoning of *Boyd* and those cases which adopted *Boyd's* holding.¹⁴⁶ Rather, the

137. *Boyd v. United States*, 116 U.S. 616, 633-34 (1886).

138. *Id.* at 634.

139. Brief for Respondent, *supra* note 132, at 39.

140. 33 U.S.C. § 1321(b)(3) (1976 & Supp. III 1979).

141. *Boyd v. United States*, 116 U.S. 616, 634 (1886).

142. 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

143. Brief for Respondent, *supra* note 132, at 39.

144. *Id.*

145. *United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Ullmann v. United States*, 350 U.S. 422 (1956); *Hoffman v. United States*, 341 U.S. 479 (1951); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lees v. United States*, 150 U.S. 476 (1893); *Boyd v. United States*, 116 U.S. 616 (1886).

146. *United States v. Ward*, 448 U.S. 242, 253-254 (1980).

Court chose to adopt the reasoning of a case subsequent to *Boyd* which had stated, "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time."¹⁴⁷ Furthermore, the Court distinguished *Ward* from *Boyd* on three grounds. First, *Boyd* dealt with forfeiture of property which, unlike the monetary fine in *Ward*, had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law. The Court noted that the FWPCA penalty was much more analogous to traditional civil damages. Second, in *Boyd* the statute under scrutiny listed forfeiture along with fine and imprisonment as one possible punishment for custom fraud while under the penalty challenged in *Ward*, the civil remedy and the criminal remedy were contained in statutes enacted seventy years apart. Third, there existed a danger, in *Boyd*, that the defendants would prejudice themselves with respect to later criminal proceedings whereas *Ward* was protected by section 311(b)(5)¹⁴⁸ which expressly provides that "notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."¹⁴⁹ Justice Rehnquist concluded that in view of the "overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect,"¹⁵⁰ the Court could not hold section 311(b)(6)¹⁵¹ to create a criminal or "quasi-criminal" penalty.

In a concurring opinion, Justice Blackmun took the position that consideration of all of the *Mendoza-Martinez* standards was warranted because of the attention given them by the Tenth Circuit Court of Appeals.¹⁵² Justice Blackmun did not, however, agree with the Tenth Circuit's conclusion that none of the *Mendoza-Martinez* factors strongly supports a "civil" designation for a penalty proceeding under section 311(b)(6).¹⁵³ He concluded that while any one of the factors considered by itself may not weigh heavily in favor of a "civil" designation, cumulatively they point significantly in that direction.¹⁵⁴

147. *Fisher v. United States*, 425 U.S. 391, 407 (1976).

148. 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

149. *Id.*

150. *United States v. Ward*, 448 U.S. 242, 254 (1980).

151. 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

152. *United States v. Ward*, 448 U.S. 242, 256 (1980).

153. 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

154. *United States v. Ward*, 448 U.S. 242, 256 (1980).

In a dissenting opinion, Justice Stevens focused on the question whether the compelled disclosure of information was designed to assist the government in imposing a penalty rather than furthering a valid regulatory purpose. Justice Stevens agreed with the Court of Appeals that the penalties under section 311(b)(6) are not calculated to reimburse the government for the cost of cleaning of the spill, but rather to exact retribution for causing the spill.¹⁵⁵

V. ANALYSIS OF THE SUPREME COURT DECISION

While the *Mendoza-Martinez* factors have been widely used in determining whether a penalty is civil or criminal in nature, some aspects of the *Mendoza-Martinez* tests have been eroded. The Supreme Court, in its analysis of the nature of the Clean Water Act penalty attached relatively little weight to the *Mendoza-Martinez* factors in general, but concluded that they did provide some guidance.¹⁵⁶ Of those factors, the Court focused principally on whether the behavior to which the sanction applies is already a crime, and whether its operation will promote the traditional aims of punishment. Justice Blackmun's concurring opinion in *Ward* commented that while the remaining *Mendoza-Martinez* factors merit discussion as well, one should assign "less weight to the role of scienter, the promotion of penal objectives, and the potential excessiveness of fines than did the Court of Appeals."¹⁵⁷

In setting aside some of the *Mendoza-Martinez* factors, the Supreme Court in *Ward* set up a two-tiered line of inquiry which may be useful in future cases. First, the Court examined whether Congress had expressed a preference for a civil rather than a criminal sanction, and second, where Congress has indicated an intention to establish a civil penalty, whether the sanctions are so punitive as to transform what was intended as a civil remedy into a criminal penalty.

In addressing the first question, the Supreme Court placed much emphasis upon Congress' labeling of the sanction as "civil," par-

155. *Id.* at 257-58. Justice Stevens pointed to the following factors which led him to such a conclusion. The owner or operator is liable for cleanup costs under § 311(f) and, in the event that the spill is determined to be "nonremovable," under § 311(b)(2)(B), for liquidated damages. Payment of these damages does not relieve the violator of liability for § 311(b)(6) penalties. He further reasoned that the Court of Appeals had correctly applied the factors enumerated in *Mendoza-Martinez* in reaching its conclusion that the penalty is criminal in nature.

156. *United States v. Ward*, 448 U.S. 242, 249 (1980).

157. *Id.* at 256.

ticularly in relation to its placement in the statute following the criminal penalty provision of the previous paragraph.¹⁵⁸ The Court thus concluded its inquiry into congressional intent without further examination of this area, accepting the fact that Congress did not deem it necessary to extend to defendants under this section of the Clean Water Act the constitutional protections normally accorded criminal defendants. In contrast with the Tenth Circuit, the Supreme Court did not conduct an in-depth analysis of congressional intent discernible from the face of the statute, the operation of enforcement scheme, and the indicators of congressional intent enumerated in *Mendoza-Martínez*.

In responding to the second part of its inquiry—whether the sanction was so punitive as to transform the civil remedy into a criminal penalty—the Court posed two additional questions: whether the behavior or activity in question is already a crime, and whether the penalty under scrutiny is quasi-criminal. A conclusion that the activity is already a crime would indicate the criminal nature of the “civil” sanction, and a conclusion that the penalty is quasi-criminal would extend to a defendant the fifth amendment protection against self-incrimination without further constitutional privileges normally present in a criminal case.

In a determination of whether the activity in question is already a crime, the Court found controlling the fact that the criminal penalty provision of the Refuse Act¹⁵⁹ was entirely distinct from the civil sanction provision of the Clean Water Act, and enacted seventy years prior to it. Thus the Court in *Ward*, as well as in previous cases, held that Congress may place both criminal and civil sanctions in separate and distinct parts of the same statute clearly distinguishing them,¹⁶⁰ or may place such sanctions in different statutes. With respect to the activity in *Ward* already being a crime under the Refuse Act, the Supreme Court found it determinative that the civil

158. The Court was referring to the fact that 33 U.S.C. § 1321(b)(5) discusses the criminal penalty associated with failure to give notice immediately of a discharge, whereas the paragraph immediately following that section, § 1321(b)(6), begins with a discussion of the civil penalty assessed against violators.

159. See note 47 *supra*.

160. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (Court held that acquittal of a charge of willful attempt to evade or defeat any tax imposed by the Revenue Act, which subjects those convicted to fine and imprisonment under § 146 does not bar assessment and collection of 50 percent of total deficiency as penalty under § 293). See also *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236-37 (1972) (Court held that acquittal under 18 U.S.C. § 545, placing a criminal penalty upon the failure to declare imported merchandise, did not bar forfeiture action under 19 U.S.C. § 1497).

and criminal sanctions are in separate statutes. In fact, the Court in the past upheld civil convictions based on a violation of a statute which contained, in separate sections (of the same statute), both a criminal and a civil sanction.¹⁶¹

In deciding whether a penalty is quasi-criminal, the Court took into consideration three factors: the nature of the penalty, possible prejudice with respect to later criminal proceedings, and parallel criminal and civil sanctions. In cases where the penalty under question bears a reasonable relationship to the damage incurred by society or to the cost of enforcement, the Court indicated that it will not view the sanction as quasi-criminal.¹⁶² Such a correlation would tend toward a remedial rather than a punitive or retributive purpose. A statute which placed the defendant in a position that could cause him to prejudice himself in respect to later criminal cases would, in the Court's view, be a further indication that the statute is quasi-criminal. As the *Ward* Court indicated, inclusion of a use immunity clause, as in section 311(b)(5),¹⁶³ would eliminate problems of prejudice.

VI. DISCUSSION

A. *Civil vs. Criminal Penalties*

Civil penalties have been widely adopted in the field of environmental protection. Much environmental legislation now contains provisions for civil penalties which may be assessed against those who violate either the acts or compliance orders issued thereunder.¹⁶⁴ The purpose behind imposing civil, rather than criminal penalties has been to enable the prosecutor to escape the burdens imposed upon him by the constitutional protections afforded a criminal defendant.¹⁶⁵ An additional purpose behind civil penalties is to avoid the stigma attached to criminal sanctions.¹⁶⁶ These con-

161. See note 160 *supra*.

162. *United States v. Ward*, 448 U.S. 242, 253-54 (1980).

163. 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

164. Below is a list of selected statutes authorizing civil penalties: Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (1976); Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1223-27 (1976 & Supp. III 1979); Energy Reorganization Act, 42 U.S.C. § 5801 (1976 & Supp. III 1979); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1979).

165. H. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies* 2 (Nov. 17, 1972) (unpublished report on file at *Cornell Law Review*), cited in Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 480 (1974).

166. H. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies* 1 (Nov. 17, 1972) (unpublished

stitutional protections include the procedural safeguards of criminal due process, including trial by jury and the presumption of innocence until proven guilty beyond a reasonable doubt. Such safeguards are absent in proceedings involving civil rather than criminal penalties.

The principle distinguishing feature between civil and criminal penalties has traditionally been their purpose: civil penalties are "remedial" while criminal penalties are "punitive."¹⁶⁷ Many cases to date have involved determinations whether a penalty is to be treated as civil or criminal.¹⁶⁸ Numerous cases have isolated individual factors in an attempt to answer that question,¹⁶⁹ whereas others have considered a number of factors.¹⁷⁰

B. The Clean Air Act and the Effluent Limitation Sections of the Clean Water Act

An act similar to the Clean Water Act in terms of fifth amendment considerations is the Clean Air Act.¹⁷¹ This Act contains reporting and recordkeeping requirements and these records may be used by the Administrator of the EPA to assure compliance with the Act's effluent limitation standards.

While the Clean Air Act is divided into three subchapters, only the first subchapter, that covering the subject of stationary sources of pollution will be examined here, since it alone presents a fifth amendment issue.¹⁷² An expressed purpose of the Clean Air Act is "to pro-

report on file at *Boston University Law Review*), cited in Dietz, *Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases*, 55 B.U. L. REV. 112, 112 (1975).

167. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 398-401 (1938); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963).

168. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *United States v. Regan*, 232 U.S. 37 (1914); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Bell v. Wolfish*, 441 U.S. 520 (1979). See also, text and notes at notes 42-83 *supra*.

169. See cases discussed in Charney, *The Need for Constitutional Protections for Defendants in Civil Cases*, 59 CORNELL L. REV. 478, 492-514 & nn.90-171 (1974). In this article, Charney reviews and evaluates the factors used by the courts. Charney finds particularly distressing the deference by the courts to Congress in determining whether a sanction is civil or criminal. He feels that although such an approach appears to carry out congressional purpose, it avoids the issue of whether Congress has exceeded its constitutional authority. Charney argues that congressional labelling should not be determinative of such a question.

170. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

171. 42 U.S.C. §§ 7401-7462 (Supp. III 1979).

172. 42 U.S.C. subch. I, §§ 7401-7508 covers generally the subject of stationary sources of

tect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."¹⁷³

Under the Clean Air Act, the Administrator of the EPA is to establish nationwide ambient air quality control regions in any area which he deems appropriate.¹⁷⁴ Each state must in turn develop a state implementation program (SIP) to control the level of air pollution which complies with certain minimum national standards subject to the approval of the Administrator.¹⁷⁵ Each SIP must provide for the achievement of national ambient air quality standards as set by the Administrator.¹⁷⁶ Such plans, once approved, are enforceable by either the State or the Administrator.¹⁷⁷

The enforcement provisions of the Clean Air Act, together with the civil penalty provisions embodied therein, are similar in effect to those of the Clean Water Act.¹⁷⁸ Under section 111(e) of the Clean Air Act, it is unlawful for any owner or operator of any new source to operate in violation of a standard of performance.¹⁷⁹ With respect to existing stationary sources, section 112 of the Clean Air Act is applicable.¹⁸⁰ Under that section, no air pollutant may be emitted by any stationary source in violation of the applicable emission standard, nor may any person construct any new source or modify any existing source which, in the administrator's judgment, will emit an air pollutant to which such standard applies.¹⁸¹ Enforcement of the pro-

pollution; *Id.* at subch. II, §§ 7521-7574 deals with emissions from mobile sources; *Id.* at subch. III, §§ 7601-7642 covers administrative and general provisions.

173. Clean Air Act, § 101(b)(1), 42 U.S.C. § 7401(b)(1) (Supp. III 1979).

174. *Id.* § 107(c), 42 U.S.C. § 7407(c).

175. *Id.* § 110, 42 U.S.C. § 7410.

176. *Id.* § 112(d), 42 U.S.C. § 7412(d).

177. *Id.* §§ 110-114, 42 U.S.C. §§ 7410-7414.

178. See text and notes at notes 21-40 *supra*.

179. 42 U.S.C. § 7411(e) (Supp. III 1979). A "new source" means "any stationary source, the construction or modification of which is commenced after the publication of regulations . . . [40 Fed. Reg. 53,346 (1975)] prescribing a standard of performance under this section which will be applicable to such source." Clean Air Act § 111(a)(2), 42 U.S.C. § 7411(a)(2) (Supp. III 1979). A "standard of performance" which the Administrator issues a new source under the Act is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." *Id.* § 111(a)(1), 42 U.S.C. § 7411(a)(1).

180. 42 U.S.C. § 7412 (Supp. III 1979). Under this section, stationary source has the same meaning as under § 7411(a). Under § 7411(a), a stationary source is "any building, structure, facility or installation which emits or may emit any air pollutant." *Id.*

181. Clean Air Act, § 112(c)(1), 42 U.S.C. § 7412(c)(1) (Supp. III 1979).

visions of this section may be accomplished by the state via its own procedure, or by the Administrator of the EPA.¹⁸²

In an effort to determine whether any person is in violation of any requirement of a SIP or any emission standard, the Administrator may require the owner or operator to install monitoring equipment and submit reports¹⁸³ and may exercise a right of entry to copy records, sample emissions and inspect monitoring equipment.¹⁸⁴ Under section 114(b)(1),¹⁸⁵ the state may develop and submit to the Administrator a procedure for carrying out this section in that state. If the Administrator finds the state procedure to be adequate, he may delegate to such state any authority he has to carry out this section.¹⁸⁶

In determining whether the state procedure is adequate, EPA regulations require that the state plan demonstrate an authority to compel self-reporting of emissions and public disclosure of what is required.¹⁸⁷ It is evident from the regulations that the EPA regards a primary purpose of section 114 to be aiding in the identification of violators of the SIP.¹⁸⁸

Whenever on the basis of information available to him, the EPA Administrator under section 113¹⁸⁹ finds that a person is in violation

182. *Id.* § 112(d)(1)-(2), 42 U.S.C. § 7412(d)(1)-(2).

183. *Id.* § 114(a)(1), 42 U.S.C. § 7414(a)(1) states that the Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter . . . to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require

184. *Id.* § 114(a)(2), 42 U.S.C. § 7414(a)(2) states that:

The Administrator or his authorized representative, upon presentation of his credentials—(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1) and sample any emissions which such person is required to sample under paragraph (1).

185. 42 U.S.C. § 7414(b)(1) (Supp. III 1979).

186. *Id.*

187. 40 C.F.R. § 51.11(a)(6) (1980).

188. The regulation states:

(a) Each plan shall show that the state has legal authority to carry out the plan, including authority to: . . . (5) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources

Id.

189. 42 U.S.C. § 7413 (Supp. III 1979).

of any requirement of any implementation plan or is in violation of section 111(e),¹⁹⁰ section 112(c),¹⁹¹ section 119(g),¹⁹² or section 114,¹⁹³ he may issue an order requiring compliance or he may bring a civil action in accordance with section 113(b).¹⁹⁴ Under this second option, the Administrator may commence a civil action for a permanent or temporary injunction, or assess and recover a civil penalty of not more than \$25,000 per day of violation of any provision as stated above. The Administrator may then commence a civil action for recovery of the non-compliance penalty and a non-payment penalty under section 120.¹⁹⁵ In determining the amount of the civil penalty the courts are to

take into account such factors as the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation (i.e. the degree to which any emission limit was exceeded and the duration and frequency of any such violation, rather than its air quality impact or its direct adverse health effect).¹⁹⁶

In addition to the above penalty, the Clean Air Act contains another enforcement provision in the form of a mandatory "non-compliance penalty."¹⁹⁷ Under this section, the State or the Administrator may assess a penalty based on the economic value to the violator of costs foregone by the violator as a result of non-compliance.¹⁹⁸ The rationale behind this provision is to offset any possible economic gain which a delay in compliance may result in to the polluter along with any possible competitive advantage over those in compliance.¹⁹⁹

Whereas the above civil penalties may be assessed against any person in violation of the provisions of the Clean Air Act, criminal sanctions may be imposed only upon a showing of some conscious wrong-

190. *Id.* § 7411(e) relates to new source performance standards.

191. *Id.* § 7412(c) relates to standards for hazardous emissions.

192. Section 119(g) as in effect before August 7, 1977 related to energy-related authorities, 42 U.S.C. § 7419(g) (repealed 1977).

193. 42 U.S.C. § 7414 (Supp. III 1979) relates to reporting requirements and inspections, etc.

194. *Id.* § 7413(b).

195. *Id.* § 7420.

196. H.R. REP. NO. 294, 95th Cong., 1st Sess. 3, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1147-48.

197. Clean Air Act, § 120, 42 U.S.C. § 7420 (Supp. III 1979).

198. *Id.* 120(d)(2)(A), 42 U.S.C. § 7420(d)(2)(A).

199. H.R. REP. NO. 294, 95th Cong., 1st Sess. 3, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1155.

doing. A person who "knowingly" violates the provisions of the Clean Air Act²⁰⁰ is subject to a fine of not more than \$25,000 per day of violation or by imprisonment of not more than one year, or by both.²⁰¹ The Act also provides for a \$10,000 fine and/or six months imprisonment for any person who knowingly makes a false statement in any required document or tampers with any required monitoring device.²⁰²

Section 311 of the Clean Water Act, in contrast with subchapter I of the Clean Air Act, deals with discharges of oil and hazardous matter which are either accidental or infrequent, rather than of a continuing nature. Sections 301,²⁰³ 302,²⁰⁴ 303,²⁰⁵ 304,²⁰⁶ 306,²⁰⁷ and 307²⁰⁸ of the Clean Water Act deal with an ongoing discharge, effluent limitations, and a discharge permit system similar to those under the Clean Air Act. The Clean Water Act effluent limitation provisions are monitored under a recordkeeping and reporting provision²⁰⁹ and enforced through compliance orders,²¹⁰ criminal penalties,²¹¹ and civil penalties²¹² as are those provisions under subchapter I of the Clean Air Act. While there are some differences between the enforcement²¹³ and recordkeeping requirements of the Clean Water Act effluent limitation provisions and those of the Clean Air Act, the two Acts may be treated alike for fifth amendment purposes.

The same fifth amendment challenge which was made in *Ward* may also be made with respect to subchapter I of the Clean Air Act and sections 308 and 309 of the Clean Water Act. While section 311 of the Clean Water Act may appear quite different from the sections

200. See text and notes at 88-92 *supra*.

201. Clean Air Act, § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. III 1979). This section further states that if the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

202. *Id.* § 113(c)(2), 42 U.S.C. § 7413(c)(2).

203. 33 U.S.C. § 1311 (1976 & Supp. III 1979) (effluent limitations).

204. *Id.* § 1312 (water quality related effluent limitations).

205. *Id.* § 1313 (water quality standards and implementation plans).

206. *Id.* § 1314 (information and guidelines).

207. *Id.* § 1316 (national standards of performance).

208. *Id.* § 1317 (toxic and pretreatment effluent standards).

209. Clean Water Act, § 308, 33 U.S.C. § 1318 (1976 & Supp. III 1979).

210. *Id.* § 309(a)(6), 33 U.S.C. § 1319(a)(6).

211. *Id.* § 309(c), 33 U.S.C. § 1319(c).

212. *Id.* § 309(d), 33 U.S.C. § 1319(d).

213. The Clean Water Act contains no mandatory non-compliance penalty as found in the Clean Air Act, § 120, 42 U.S.C. § 7420 (Supp. III 1979).

dealing with effluent limitations of the Clean Air and Clean Water Acts, the fifth amendment issues are the same.

*C. A Comparison of Section 311 of the Clean Water Act
with the Clean Air Act and the Effluent Limitation
Sections of the Clean Water Act*

It is apparent that the regulatory schemes under the Clean Air Act provisions and the Clean Water Act effluent limitation sections are similar in many respects to that of the Clean Water Act oil spill section.²¹⁴ Each defines explicitly the nature of the prohibited actions.²¹⁵ A reporting requirement is present in both the oil spill section and the effluent limitation section of the Clean Water Act as well as in the Clean Air Act. Under FWPCA section 311, one who discharges hazardous substances must notify the appropriate agency,²¹⁶ while under the Clean Air Act and FWPCA section 308, recordkeeping and reporting provisions are set out.²¹⁷ Each insures compliance with its reporting provisions by imposing fines for failure to report or notify.²¹⁸ The major difference in these provisions is that although the FWPCA notification provision contains a "use immunity" clause, a similar clause is absent from the corresponding Clean Air Act provision and FWPCA effluent limitation sections. A person who provides information under Clean Air Act section 114, or under FWPCA section 308 may be liable for a criminal penalty if his violation was "knowingly" made.²¹⁹

The enforcement provisions of FWPCA section 311 as well as FWPCA section 309 and Clean Air Act section 113 imposes high maximum fines without any scienter requirement. The Clean Air Act

214. Clean Water Act, § 311, 33 U.S.C. § 1321 (1976 & Supp. III 1979).

215. Compare Clean Water Act, § 311(b)(3), 33 U.S.C. § 1321(b)(3) (1976 & Supp. III 1979) with Clean Air Act, §§ 111-112, 42 U.S.C. §§ 7511-7512 (Supp. III 1979), and Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (1976 & Supp. III 1979).

216. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

217. Clean Air Act, § 114(a), 42 U.S.C. § 7414(a) (Supp. III 1979); Clean Water Act, § 308, 33 U.S.C. § 1318 (1976 & Supp. III 1979).

218. Under the Clean Air Act oil spill liability section, failure to notify may result in a fine of up to \$10,000 and/or imprisonment of up to one year. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979). Under the Clean Air Act, the Administrator may assess a civil penalty of up to \$25,000 per day for violations of the recordkeeping provisions. Clean Air Act, § 113(b)(4), 42 U.S.C. § 7413(b)(4) (Supp. III 1979). Under the FWPCA effluent limitation sections, violations of the recordkeeping provisions are subject to a penalty of up to \$10,000 per day of violation. Clean Air Act, § 309(d), 33 U.S.C. § 1319(d) (1976 & Supp. III 1979).

219. Clean Air Act, § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. III 1979); Clean Water Act, § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1976 & Supp. III 1979).

and the effluent limitation sections of the FWPCA imposes an additional criminal sentence upon persons who knowingly engage in such violations, while section 311 of the Clean Water Act draws no such distinction.²²⁰

While the fifth amendment issue under the Clean Air Act and the FWPCA effluent limitation sections are quite similar to that under the Clean Water Act oil spill section, there are, of course, differences in the regulatory and enforcement schemes. Those differences are largely attributable to the fact that the activities governed are different in nature. One distinction is that the provisions of section 311 of the FWPCA deal with the discharge of hazardous substances or oil which takes place at a more or less specific point in time rather than with an ongoing process of emissions into the air as in the Clean Air Act and effluent limitation sections of the FWPCA. This difference is evidenced by the fact that the Clean Water Act civil penalty applies to "each offense"²²¹ whereas the Clean Air Act and FWPCA section 309 civil penalties are assessed in terms of "per day of violation."²²²

The reporting requirements of these provisions are different as well. The notification requirement of the Clean Water Act oil spill section is limited merely to making a report of the discharge as soon as the owner or operator of the facility has such knowledge.²²³ Reporting requirements under the Clean Air Act and the Clean Water Act effluent limitation sections are more of an ongoing process dealing with day-to-day compliance with applicable emission requirements. Furthermore, the reporting requirements of the latter are far more burdensome as they include a provision for monitoring equipment, emission samples, right of entry of the Administrator, and other information in order to determine compliance with the Act's sections.

While there are differences, it is clear that the reporting and civil penalty provisions of the Clean Air Act as well as section 308 of the Clean Water Act are analogous to the sections of the Clean Water Act examined in *United States v. Ward*.²²⁴ It is therefore conceivable

220. Compare Clean Air Act, § 311(b)(6), 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979) with Clean Air Act, § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. III 1979) and Clean Water Act, § 309(c)(2), 33 U.S.C. § 1319(c)(2) (1976 & Supp. III 1979).

221. Clean Water Act, § 311(b)(6), 33 U.S.C. § 1321(b)(6) (1976 & Supp. III 1979).

222. Clean Air Act, § 113(b), 42 U.S.C. § 7413(b) (Supp. III 1979); Clean Water Act, § 309(d), 33 U.S.C. § 1319(d) (1976 & Supp. III 1979).

223. Clean Water Act, § 311(b)(5), 33 U.S.C. § 1321(b)(5) (1976 & Supp. III 1979).

224. 448 U.S. 242 (1980).

that a challenge to the Clean Air Act may arise, under a claim of violation of the fifth amendment protections against self-incrimination.²²⁵ Such a challenge might arise from a conviction under either the criminal penalty provision or the civil sanction provision.

D. Clean Air Act Criminal Penalty

A significant feature of the Clean Air Act is that a violation knowingly committed subjects the violator to a criminal sanction which could result in a \$25,000 per day fine as well as one year of imprisonment.²²⁶ A person is required, under the Act, to provide information that may incriminate him under a provision imposing criminal sanctions. While the purpose of the recordkeeping requirements as asserted by the EPA is to insure compliance with the Standard of Performance and to identify violators, there is nothing in the statute to prevent such information from being used in a criminal action against the party. In contrast to section 311 of the Clean Water Act, the Clean Air Act contains no use immunity protection to prevent a defendant from being prejudiced in a criminal case. A court considering a conviction under the Clean Air Act criminal penalty provision should therefore hold such a conviction invalid if it was based on information obtained through the self-reporting and recordkeeping scheme of the Act.²²⁷

E. Clean Air Act Civil Penalty and the Required-Records Doctrine

The distinguishing feature between the reporting required in *Ward*, and that under the Clean Air Act is that the Clean Air Act deals with recordkeeping requirements. The self-reporting provisions of the Clean Water Act considered in *Ward* are triggered by specific, non-routine events which lead to penalties. A litigant challenging the Clean Air Act therefore faces an obstacle not present in *Ward*, since the Supreme Court, has, in the past rejected fifth amendment challenges to routine recordkeeping requirements of other statutes. The refusal to allow fifth amendment protections in

225. Research into this area has revealed that the fifth amendment issue has not been litigated with respect to the Clean Air Act.

226. Clean Water Act, § 113(c)(1), 42 U.S.C. § 7413(c)(1) (Supp. III 1979). A similar provision appears in Clean Water Act, § 309(c), 33 U.S.C. § 1319(c) (1976 & Supp. III 1979).

227. See, e.g., *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).

required reporting cases has led to the "required-records" doctrine. The Court, in *Shapiro v. United States*,²²⁸ held that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and enforcement of restrictions validly established."²²⁹

The "required-records" doctrine, however, has been overturned by the Court in a number of cases dealing with statutes aimed at extracting information from members of the Communist Party (*Albertson v. Subversive Activities Control Board*),²³⁰ gamblers (*Marchetti v. United States*),²³¹ owners of firearms (*Haynes v. United States*),²³² and dealers in drugs (*Leary v. United States*).²³³ In those cases, the Court concluded that the reporting requirements were aimed at a highly selective group inherently suspect of criminal activities, rather than members of the general public and that application of the required-records doctrine was not warranted. *Shapiro* was distinguished on the ground that the statute under challenge required the petitioner to "preserve for examination" various records "of the same kind as he customarily kept . . ."²³⁴ whereas the cases involving select groups required reporting of information which may

228. 335 U.S. 1 (1948). In *Shapiro*, the petitioner, a wholesale fresh produce dealer, was subject to the Wartime Emergency Price Control Act of 1942 (50 U.S.C. App. § 901-946) (omitted from Code as terminated). Regulations promulgated under the Act required that anyone subject to the Act "preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery . . . and that he keep records of the kind he customarily had kept." In response to a subpoena *duces tecum*, petitioner produced the materials required by the Act. When he was subsequently prosecuted for violation of the Act, he asserted as a plea in bar that the compulsory production of the materials had given him immunity, or, if no such immunity had been granted, that the statute under which he was prosecuted was unconstitutional. In rejecting his argument, the Court held that production of the material in issue could constitutionally be required of petitioner by the government without granting him immunity from prosecution or from its use. Although acknowledging limits on the government's right to require the keeping of records which must be made available to government investigators, the Court declared that "no serious misgivings that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern" 335 U.S. at 32.

229. *Id.* at 17.

230. 382 U.S. 70 (1965).

231. 390 U.S. 39 (1968).

232. 390 U.S. 85 (1968).

233. 395 U.S. 6 (1969).

234. *Marchetti v. United States*, 390 U.S. 39, 57 (1968) (quoting *Shapiro v. United States*, 335 U.S. 1 (1948)).

or may not have been maintained. Records required under the Clean Air Act also seem to fall in this latter category as the EPA may require the operator or owner of an emission source to maintain records (regardless of whether the operator customarily kept such records), install and maintain monitoring equipment or methods, and to sample emissions in accordance with such methods.²³⁵

The Supreme Court addressed the issue of required records with respect to a California hit-and-run statute in the leading case of *California v. Byers*.²³⁶ The issue there was the validity of the state hit-and-run statute requiring any driver involved in an accident resulting in property damage to stop at the scene and leave his name and address. The Supreme Court held the statutory scheme to be valid since under the test enunciated in *Albertson, Marchetti, Haynes, and Leary*,²³⁷ drivers involved in accidents were not a "highly selective" group or "inherently suspect of criminal activities."²³⁸ The Court noted further that "the statutory purpose is non-criminal and self-reporting is indispensable to its fulfillment."²³⁹ In reaching its decision, the Court also considered the fact that the statute merely required disclosure of name and address, an act which it considered as essentially neutral.

The Clean Air Act's recordkeeping requirements are similar in some respects to the self-reporting requirement upheld in *Byers*. In both cases, there is a risk of self-incrimination. In both, one finds a primary non-criminal government purpose for requiring self-reporting. In *Byers*, it was insuring a system of financial responsibility for automobile accidents; in the Clean Air Act, it is to insure compliance with pollution standards. Furthermore, in both, self-reporting is essential to achievement of the non-criminal purpose.

While analogies may be drawn between the reporting required in *Byers* and that in the Clean Air Act, the Clean Air Act provisions are distinguishable in some important respects. First, it is debatable whether the persons charged with the reporting requirements are members of the public at large. It may be argued that they are a "highly selective group" as were the defendants in *Albertson, Marchetti, Haynes, and Leary*, although they are not suspect of

235. Clean Air Act, § 114(a)(1), 42 U.S.C. § 7414(a)(1) (Supp. III 1979).

236. 402 U.S. 424 (1971).

237. See notes 230-33 *supra*.

238. *California v. Byers*, 402 U.S. 424, 430 (1971).

239. *Id.* at 431.

criminal activities. Second, the Clean Air Act recordkeeping is for the purpose of insuring compliance with the provisions of the Act and to aid in the identification of its violators. This is in contrast to the California hit-and-run statute which was designed to promote the satisfaction of civil liabilities arising from automobile accidents. Third, the Clean Air Act places upon the operator of an emission source a much heavier burden than merely reporting his name and address. It gives the Administrator of the EPA wide ranging authority to gather information from such an operator. As mentioned previously, such information is to be distinguished from records which are customarily kept.

*F. Ward Reasoning Applied to a Challenge
to the Clean Air Act*

If a litigant challenging the Clean Air Act penalty provision were able to distinguish successfully his case from *Byers* on the grounds noted above, he would then be faced essentially with a problem similar to that considered in *Ward*. Following the *Ward* reasoning, a court would make a two-tiered inquiry into the question of criminal versus civil sanctions. It would consider first whether Congress expressed a preference for one label over the other, and second, where Congress had indicated an intention to establish a civil penalty, whether the statutory scheme was so punitive either in purpose or effect to negate that intention. A court considering the validity of the civil penalty scheme of the Clean Air Act²⁴⁰ should follow the *Ward* reasoning and hold those provisions constitutionally valid.

It is clear that in the case of the Clean Air Act, Congress intended a civil penalty. Furthermore, the legislative history of the Clean Air Act suggests a remedial purpose in that it attempts to render non-compliance more costly than investment in pollution control and the fact that the noncompliance penalty is based on the economic value of costs foregone by the violator as a result of noncompliance.²⁴¹

In the second part of its inquiry, a court applying the *Ward* reasoning to the Clean Air Act would essentially address whether the penalty in question is quasi-criminal. The *Ward* Court, in deciding this issue examined three factors: the nature of the penalty, possible prejudice with respect to later proceedings, and whether the activity in question is already a crime. As previously noted, the legislative

240. Clean Air Act, § 113(b), 42 U.S.C. § 7413(b) (Supp. III 1979).

241. See text and notes at 197-99 *supra*.

history of the Clean Air Act tends to indicate a remedial rather than a punitive intent.²⁴² Since the seriousness of the violation is taken into account as well as the costs saved by noncompliance, the penalty bears a reasonable relationship to the damage incurred by society. As the activity in question is not already a crime, the first two factors indicate that the civil penalties are not quasi-criminal. With respect to the third factor, it is possible for a defendant to prejudice himself with respect to later proceedings because the information received through the records required might be used against the defendant in a criminal prosecution for a *knowing* violation under section 113(c)(1).²⁴³ This would be a conviction for a different type of activity, however, since the criminal penalty is levied only upon violations "knowingly" made, while the civil penalties apply to other violations. As previously mentioned, the Clean Air Act embodies no use immunity provision similar to that of the Clean Water Act. Because of this omission, the well-reasoned opinion will hold that information received pursuant to recordkeeping requirements shall not be used in any prosecution under section 113(c)(1), the criminal penalty provision.

A court faced with a challenge to the civil penalty sections of the Clean Air Act²⁴⁴ on the basis that they violate the litigant's fifth amendment privilege against self-incrimination will ultimately have to determine whether those penalties are civil or criminal in nature. The framework used by the Court in *United States v. Ward* in resolving this issue should be applied. The foregoing analysis of the Clean Air Act in light of the *Ward* decision indicates the civil rather than criminal or quasi-criminal nature of the Clean Air Act penalties. It is therefore constitutionally permissible for information obtained through the Clean Air Act recordkeeping provisions to be used by the government in assessing civil penalties against violators of the Clean Air Act.

VII. CONCLUSION

Sections of the Clean Water and Clean Air Acts require extensive disclosure of information by polluters. Both of these Acts have provisions authorizing information gained through such self-disclosure to be used against the alleged polluter by the government to identify

242. See text and notes at 196-99 *supra*.

243. 42 U.S.C. § 7413(c)(1) (Supp. III 1979).

244. Clean Air Act, §§ 113(b), 120, 42 U.S.C. §§ 7413(b), 7420 (Supp. III 1979).

violators and exact penalties. Such use of information raises questions with respect to the fifth amendment privilege against self-incrimination which states that "[n]o person, . . . shall be compelled in any criminal case to be a witness against himself" Since the fifth amendment privilege applies only to criminal cases, determining whether a penalty is criminal or civil is of great significance.

The courts have formulated various criteria in an effort to draw the civil-criminal distinction. The Supreme Court in *United States v. Ward* had made this distinction and firmly established the constitutionality of the enforcement and reporting scheme under the oil discharge section of the Clean Water Act. In reaching its decision, the Court has set up a framework which is likely to be used in future cases dealing with a civil versus criminal penalty. Under this framework, the Court examined first whether Congress indicated an intention to establish a civil or a criminal penalty, and second, where Congress has indicated a civil penalty, whether the sanction was so punitive as to negate that intention. Since other sections of the Clean Water Act (dealing with effluent limitations) as well as sections of the Clean Air Act provide for extensive self-disclosure which may be used to assess civil penalties against violators, the provisions under scrutiny in *Ward* have been compared herein. An analysis has been made of the Clean Air Act penalty provisions which may face a fifth amendment challenge similar to that in *Ward*. Using the framework established in *Ward*, it is concluded that the civil penalty provisions of the Clean Air Act should withstand constitutional challenge. The *Ward* reasoning should not be limited solely to environmental legislation, but will probably be adopted in other areas as well.